Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center *and* District 1199J NUHHCE, AFSCME, AFL–CIO.
Cases 22–CA–093626 and 22–RC–080916

November 25, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On March 13, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 77. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. The Board's March 13, 2013 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issues that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause, the Respondent reiterates its pre-election argument that the Regional Director erred in finding that its licensed practical nurses are not supervisors.[1]

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the Respondent's request for review of the Regional Director's Decision and Direction of Election, and we find the Respondent's arguments to be without merit. Accordingly, we affirm the decision to deny the Request for Review in the prior proceeding.[2]

[1] The Respondent also contends that the complaint should be dismissed or a hearing held because the initial charge was not properly served upon the Respondent. We find no merit to this contention. First, it is uncontested that the Region served the charge on the Respondent's attorney of record in the underlying representation proceeding. This same attorney entered a notice of appearance on behalf of the Respondent 4 days after being served with the charge, and filed a timely answer to the complaint and a response to the Notice to Show Cause. The affidavit of service of the charge is included in the documents supporting the Acting General Counsel's motion for summary judgment, showing the date as alleged, and the Respondent has not challenged the authenticity of these documents. Accordingly, we find that the Respondent had notice of the filing of the charge. See *Pasco Packing Co.*, 115 NLRB 437, 438 (1956) (adequate notice given to respondent by service of documents on attorney of record in representation proceeding, from which the unfair labor practice proceeding emanated). Second, it is also uncontested that the Region served the charge on the Respondent by facsimile. The Board has held that technical defects in the form of service will not necessarily invalidate the service. See *Control Services*, 303 NLRB 481, 481 (1991) ("when charges have in fact been received, technical defects in the form of service do not affect the validity of the service"), enfd. mem. 961 F.2d 1568 (3d Cir. 1992). Third, the complaint was properly served on the Respondent (and its attorney of record) within the 10(b) period. Thus, even assuming the charge was not properly served on the Respondent in a timely manner, such a failure "will be cured by timely service within the 10(b) period of a complaint on the respondent, absent a showing that the respondent is prejudiced by [the] circumstances." *Buckeye Plastic Molding*, 299 NLRB 1053, 1053 (1990). Here, there has been no assertion, much less a showing, of prejudice to the Respondent in this proceeding.

The Respondent's final argument is that the complaint should be dismissed because the Acting General Counsel could not properly be appointed under the Federal Vacancies Reform Act and therefore lacked authority to issue the complaint in this case. For the reasons stated in *Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. at 1 (2014), we reject this argument.

[2] In denying review of the Regional Director's finding that the Employer has failed to establish that the LPNs are statutory supervisors based on their authority to assign employees, we find, as did the Regional Director, that, even assuming that LPNs have the authority to assign CNAs, the Employer has failed to show that LPNs exercise independent judgment in making such assignments.

In finding that the Employer failed to establish that the LPNs have the authority to adjust grievances, the Regional Director pointed to the minor character of the grievances resolved by the LPNs, some of which involved patient complaints. We find it unnecessary to characterize the grievances or to address whether the resolution of patient complaints is relevant to the grievance adjustment indicia of Sec. 2(11) authority because the evidence fails to show that LPNs use independent judgment in resolving them.

We next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, the Regional Director would have conducted the election as scheduled and counted the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states:

> The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original).

See also Casehandling Manual, Part 2, Representation Proceedings, Sections 11274, 11302.1(a) (same). However, this vote and impound process does not apply when the Board lacks a quorum. In this regard, Section 102.182 of the Board's Rules and Regulations states:

> *Representation cases should be processed to certification*.—During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Thus, it is clear that the decision of the Board to continue to issue decisions did not affect the outcome of the election. With or without a decision on the original Request for Review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's Rules, and, under *Noel Canning*, the sitting Board Members did not have the authority to issue an order directing otherwise. Thus, the timing of the election was not affected by the issuance of a decision on the Request for Review, and we find that the decision of the Regional Director to open and count the ballots was appropriate and in accordance with Section 102.182. In any event, the actions of the Regional Director did not affect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification. See also *Champlin Shores Assisted Living*, 361 NLRB No. 92, slip op. at 1–2 (2014).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and per-diem Licensed Practical Nurses employed by the Employer at its Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before December 5, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before December 19, 2014.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 9, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., November 25, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD